80-1312

No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD G. ELBERT,

Petitioner,

vs.

THE BOARD OF EDUCATION OF LANARK COMMUNITY UNIT SCHOOL DISTRICT #305, CARROLL COUNTY, ILLINOIS, DENNIS STURTEVANT, VERNON VOSS, MARY HOLESINGER, AND BETTYE ZIER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a complaint should be dismissed for failure to state a claim under 42 U.S.C. §§1983, 1985, if it alleges the following acts by a school board and its members:

1. A secret decision by them to terminate the district superintendent without notice or hearing afforded to superintendent.

2. Publication of termination of superintendent prior to notice or hearing.

3. Two refusals by the board to grant a hearing to the superintendent despite his request for such hearings.

4. Conspiracy to publish untrue charges of criminal and other improper actions by superintendent although the charges had not been approved by Board.

5. Publication of false charges of misuse of public funds in local newspaper through actions of Board members.

6. Board election which resulted in defeat of two Board members antagonistic to Petitioner.

7. Secret closed meeting with only three new Board members in response to Petitioner's demand for a hearing on charges.

8. Public statement by Board that superintendent made "errors of judgment" but was being offered new contract for next year.

The complaint further alleges that petitioner attemped to find employment elsewhere during the time of these Board actions, but was unable to do so and will be unable to do so in the future, due to the conspiratorial and

wrongful actions and untrue charges of the Board and its members. The petitioner, therefore, was obligated to accept employment for the next year in the same school district despite the antagonistic atmosphere created by the Board.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 10, 1980.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 10, 1980, affirming dismissal of petitioner's complaint by a 2-1

majority. A denial of petition for rehearing was entered by the United States Court of Appeals for the Seventh Circuit on November 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment (XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS

Title 42 U.S.C. § 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. §1985. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS PREVENTING OFFICER FROM PERFORMING DUTIES.

* * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, appears as appendix A to this petition. The denial of Petition for

Rehearing appears as appendix B to this petition. The unreported memorandum opinion of the United States District Court for the Northern District of Illinois, dated January 9, 1978, appears as appendix C to this petition. The unreported memorandum opinion of the United States District Court for the Northern District of Illinois, dated November 21, 1978, appears as appendix D to this petition. The unreported opinion of the United States District Court for the Northern District of Illinois, dated February 13, 1979, appears as appendix E to this petition. A final order of the United States District Court for the Northern District of Illinois, dated April 20, 1979, appears as appendix F to this petition.

STATEMENT OF THE CASE

On May 9, 1977, petitioner filed a complaint in the Federal District Court. The jurisdiction of the District Court was invoked pursuant to the provisions of Title 28, U.S.C. §1331(a) and §1343(3), the complaint stating an action at law authorized by Title 42, U.S.C. §1983 and §1985.

The original complaint contained two counts. Count I contained allegations that respondents (a local school board and four individual members of the Board) by eight specific and illegal acts deprived petitioner of liberty and property rights under the Fourteenth Amendment of the U.S. Constitution, creating a cause of action under 42 U.S.C. §1983. Count II alleged a conspiracy under 42 U.S.C. §1985 to deprive petitioner of his constitutional rights.

After the original complaint had been filed, the school board met to consider raises for the next year. Petitioner was the only certified employee of the district who was denied a raise for the next year.

An amended complaint was filed in which Count I was expanded to include allegations that a *de facto* policy of granting annual raises existed in the District and that the raise had not been granted to petitioner in retaliation for his filing the original complaint. Judge Marovitz ruled by written memorandum and order that the complaint was dismissed as to the portion concerning the original allegations, but sustained only as to failure of respondents to grant petitioner a raise.

The raise issue was eventually segregated in a separate Count in petitioner's Second Amended Complaint. That Count was not dismissed by the lower court and is still awaiting trial. The raise issue is not a subject of this Petition for Certiorari.

Count I of the second amended complaint (hereinafter referred to as the "complaint") alleges that on February 24, 1976, the Lanark Board of Education voted secretly to terminate the contract of its superintendent of schools, petitioner, Donald G. Elbert, without notice or hearing as required by Illinois law. Although the contract porported to be a two-year contract expiring at the end of that school year, a two-year contract was illegal in Illinois and the contract was, in fact, a three-year contract as construed under Illinois requirements for multi-year contracts, Ill. Rev. Stat. ch. 122 §10-23.8.

On March 8, 1976, the Board voted in open session not to renew the contract of the petitioner. The following day, the petitioner was sent, for the first time, official notice of the Board's decision. At the time of notice of termination, the petitioner was 62 years old and had been employed in education for over 30 years, with the last 15 years as superintendent of various schools.

On March 16, 1976, the petitioner requested a hearing on March 24, 1976. No action was taken on his request.

Although a request had been made for a hearing, and although the law required a hearing before a decision was made to terminate, the respondents again voted not to renew the contract of the petitioner at the meeting of March 24, 1976. Specific reasons for non-renewal were publicly cited at that meeting without any opportunity for rebuttal or explanation by the petitioner. Included in the eleven cited charges were the criminal offenses of "misuse of public funds" and "using school personnel for personal business." Once again, petitioner was sent notice that his contract would not be renewed.

Petitioner made a written request that a hearing be held during the week of April 5-9, 1976. No action was taken on the request.

On March 30, 1976, petitioner requested an immediate audit concerning the charge of misuse of public funds. On April 5, 1976, the Board held a special meeting in which it voted to grant petitioner's request for an audit, but only if he paid for it. On April 6, still without a hearing, a Bill of Particulars concerning charges against petitioner was prepared by respondents Mary Holesinger and Bettye Zier. The Complaint alleges that the Bill of Particulars was never approved by the full Board of Education; it was the product of the four named respondents in this suit, who constituted a majority of the Board before the April 10 election.

Without formal approval by the Board, but with the knowledge and approval of respondents Dennis Sturtevant, Vernon Voss, Mary Holesinger and Bettye Zier, the Bill of Particulars was published in the *Carroll*

County Review, the local newspaper. The respondents published the Bill of Particulars in order to destroy petitioner's reputation and position in the community and enhance their own position before a local school board election on April 10, 1976.

The Complaint alleges that respondents had secret and covert meetings, conversations, and communications, concerning denials of hearings and publication of the Bill of Particulars (which contained false charges against petitioner). In fact, a letter from respondent Mary Holesinger (running for re-election) to Keith Kniss, a Board member, stated in part that since the hearing could not be held on the 8th or 9th (of April), "Our lawyer said it is all right to have this printed, and it will be, before the election. . . I pointed out to the *Carroll County,* Mr. Trasley, that you and Wilson had not seen these and (they) will be printed without your approval or disapproval." The *Carroll County* is a local newspaper and "Wilson" refers to Wilson Fischer, president of the Lanark Board of Education.

In the April 10 election, two of the named respondents, Mary Holesinger and Bettye Zier, were defeated; three new members joined the Board. After the election, the Board met on April 19, 20 and 28, without either petitioner or his attorney present, in order to discuss the situation concerning the petitioner. On May 3, 1976, the petitioner was given the opportunity, for the first time, to meet in closed executive session with the three newly elected Board members. Petitioner was not allowed to meet with the entire board. There was no public dissemination of the petitioner's position, and petitioner never had a public opportunity to refute the charges.

On May 10, 1976, the new Board voted to rehire petitioner for one year. In conjunction with its offer

to rehire petitioner, the Board issued conclusions concerning the facts. The first conclusion was: "Some errors of judgment were made by Mr. Elbert in the performance of his assignment as superintendent of the Lanark Schools." A further conclusion was: "That at no time did Mr. Elbert misuse public funds or personally profit or benefit from any act or decision made in the performance of his assignment as superintendent." In addition, the Board stated that there was insufficient evidence to warrant the termination of petitioner.

After receiving the initial notice of termination, petitioner attempted to obtain employment in other school districts. His applications were refused and the Complaint alleges that the refusals were due to the conspiritorial and wrongful acts of respondents which placed a stigma upon petitioner and led to loss of liberty and other constitutional rights.

Since he was unable to find employment elsewhere, petitioner was forced to accept employment for the next school year as superintendent of the Lanark School District.

Count I of the second amended complaint alleges that petitioner was deprived of constitutional rights by the acts of respondents and said deprivation constituted an action at law authorized by 42 U.S.C. §1983. Count II of the second amended complaint alleges that respondents conspired to deprive petitioner of constitutional rights and said conspiracy constituted an action at law authorized by 42 U.S.C. §1985. Count III of the second amended complaint concerns the separate and distinct raise issue and is still pending in Federal District Court.

Judge Marovitz of the Federal District Court consistently ruled in three memorandum opinions (attached

to this petition as appendixes C, D and E) that the facts eventually constituting Count I and II, taken in a most favorable light to petitioner, did not constitute a cause of action under 42 U.S.C. §1983. He cited Justice Brennan's dissent in *Paul* v. *Davis,* 424 U.S. 693 (1976), as an indication that the State could say or do anything to an employee as long as the employee was not eventually permanently terminated. Judge Marovitz concluded, therefore, that the "stigma plus" test of *Paul* v. *Davis, supra,* as refined in *Collaizzi* v. *Walker,* 542 F. 2d 969 (7th Cir. 1976), had not been met.

A final order was entered in April 20, 1979, in the Federal District Court stating that there was no just reason to delay inforcement or appeal of the dismissal of Count I and II. The order further stated that the order was a final judgment as to Count I and II under Rule 54(b) of the Federal Rules of civil procedure. (The order is contained in Appendix F to this petition.)

An appeal was filed in the United States Court of Appeals for the Seventh Circuit. On September 10, 1980, the Court of Appeals affirmed Judge Marovitz's dismissal of Counts I and II by a 2-1 majority. The majority opinion agreed with Judge Marovitz that the actions of respondents did not constitute anything more than a basis for a state defamation action. Judge Baker filed a strong dissent. He argued that "stigma plus" did exist, and that the actions of respondents had far exceeded mere defamation standing alone. On November 7, 1980, the Court of Appeals denied a petition for rehearing. This petition for writ of certiorari followed.

REASONS FOR ALLOWANCE OF THE WRIT

Certiorari should be allowed so that this Court can eliminate highly prejudicial confusion concerning the impact of *Paul* v. *Davis,* 424 U.S. 693 (1976) on the basic rights of teachers concerning their employment, and certiorari should also be allowed in order to grant petitioner adequate relief for the gross violations of his constitutional rights.

In dismissing Count I and II of petitioner's Second Amended Complaint, the Federal District Court quoted the characterization of *Paul* v. *Davis, supra,* by Justice Brennan in his *dissent.* In this dissent, Justice Brennan stated:

> "The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society." 424 U.S. at 714.

The lower court cites this minority statement in the apparent belief that *Paul* v. *Davis, supra,* stands for the idea and concept that the state may say or do anything against its employees as long as their employment is not permanently terminated. This is contrary to the apparent intent of the majority of this Court.

In its decision to dismiss Counts I and II of the second amended complaint (hereinafter referred to as the "complaint"), the lower courts have placed major reliance on *Paul* v. *Davis,* 424 U.S. 693 (1976). The facts in *Paul,* however, are strikingly dissimilar from

the facts in the present case. In *Paul,* defendant police chiefs had included a photograph of Davis in a flyer of "active shoplifters," after Davis had been arrested on a shoplifting charge in Louisville, Kentucky. After that charge had been dismissed, Davis brought an action under 42 U.S.C. §1983 against the police chiefs who had distributed the flyer to area merchants. In a 5-3 decision. this Court held that no cause of action existed under 42 U.S.C. §1983—dissents were filed by Justices Brennan, Marshall, and White. *Paul* v. *Davis, supra,* did not involve an employer-employee relationship, it did not involve notice of termination of employment, it did not involve refusal to grant required hearings, it did not involve an extensive and protracted series of statements, meetings, charges, and efforts to terminate employment unlawfully, it did not involve a continuing pattern of violation of rights, it did not involve a conspiracy, and it did not involve inability to find employment and loss of employment opportunities. These elements are all involved in the instant case.

The *Paul* v. *Davis* decision was further refined by the Seventh Circuit in *Colaizzi* v. *Walker,* 542 F. 2d 969 (7th Cir. 1976), *cert. denied,* 430 U.S. 960 (1977). In *Colaizzi,* the governor of Illinois made a public statement that two employees had abused their official positions in attempting to force a company under their supervision to drop criminal charges against an employee. The empoyees were dismissed simultaneously without notice or opportunity to be heard.

In its decision, the Seventh Circuit established a "stigma plus" test. The decision stated the rule as follows:

> "Stigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not neces-

> sarily involving a deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. §1983 for deprivation of a Fourteenth Amendment liberty interest without due process." 542 F. 2d at 973.

As stated by Judge Baker in his dissent in the present case, the test is whether the case involves defamation "standing alone and apart from any other governmental action," or whether other governmental action has been undertaken (the required "plus").

In the present case, eight specific illegal actions are alleged in the complaint and must be assumed to be true:

1. Secret meetings and decision to terminate *prior* to notice to petitioner and hearing to determine petitioner's response.

2. Refusal to grant a hearing as requested on March 16, 1976.

3. Refusal to grant a hearing as requested on March 24, 1976.

4. Public pronouncement of termination with untrue charges of criminal and improper behavior.

5. Conspiracy to publish a false Bill of Particulars in local newspaper, although Bill not yet voted or approved by Board.

6. Publication of false charges of criminal and improper conduct in newspaper through actions of respondents.

7. Secret, closed meeting with only three new Board members in response to petitioner's demand for hearing on charges.

8. Final pronouncements that petitioner made "errors of judgment" although petitioner had never had public opportunity to explain his position.

In his dissent, Judge Baker states the issue succinctly:

> "Stigma plus" is here. When the defendants charged the plaintiff with official misconduct, they stigmatized him. When they publicly announced that his contract was terminated and thereby injured his opportunity to gain employment elsewhere, they took his liberty and they did it without due process of law. The circumstance that 48 days later a new board of education relented and reinstated him might work in mitigation of the plaintiff's damages, but it did not wash away the fact that the plaintiff had been deprived of his liberty. Acts in mitigation cannot extinguish a cause of action.
>
> The majority reads *Davis* and *Colaizzi* as requiring actual termination of employment before a deprivation of liberty can occur. That, I submit, misconstrues the rulings in those cases and the "plus" of the test is properly equivalent to governmental action in the course of termination which forecloses the freedom to take advantage of other employment opportunities." (Appendix A, p. 10a)

The landmark case of *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), established the basic rights of teachers concerning their employment. Roth was a non-tenured Wisconsin professor who had received timely notice that his teaching contract would not be renewed for the next year. He demanded a hearing and was refused. This Court supported the school's position and ruled that Roth did not have a right to a hearing since he was non-tenured and his contract expired by its terms. This Court was careful to point out, however, that even a non-tenured teacher had federal protection against unfounded charges by his employers.

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' " (citations omitted) 408 U.S. at 574.

In the present case, plaintiff's contract did not expire naturally at the end of the year in question. Although the contract purported to be a two-year contract, such a contract is expressly forbidden by Illinois law (Ill. Rev. Stat. ch. 122 §10-23.8). It would have been construed as a three-year contract under Illinois law, and, therefore, it did not expire until the following year.

Prior to public notice of termination and public charges of misuse of funds and other serious allegations, plaintiff had the right to a *closed* hearing to answer Board allegations. If the allegations were baseless—as they were—they would never have been made public if plaintiff had had the opportunity to refute them in closed session.

There can be no doubt that plaintiff was denied a fair hearing prior to public pronouncement of his termination. In *Hostrop* v. *Board of Junior College District #515,* 523 F.2d 569 (7th Cir. 1975), the Court of Appeals for the Seventh Circuit states:

> "Our review of the evidence leave us with a definite and firm conviction that plaintiff was never offered a fair hearing on termination, and that in fact, the board prejudged his case before making any

> hearing available to him. There can be no real dispute that before the special session of the Board on July 23, 1970, when plaintiff was to be afforded a hearing, the board had already decided to terminate him, and had in fact made a commitment to another person to hire that person as interim president. The board having pre-judged the matter of plaintiff's termination before the July 23 meeting, and being no longer therefore 'a tribunal possessing apparent impartiality,' as required by *Hostrop I,* 471 F.2d at 495, plaintiff did not waive his right to a hearing by absenting himself from that meeting." 523 F.2d at 575-576.

In the present case, the Board had not only "prejudged" the matter of plaintiff's termination, but they had officially voted for the termination.

The Board compounded its breach of plaintiff's rights to a closed hearing before pronouncement of charges and termination by refusing plaintiff an open hearing to refute the charges after they had been made public. Instead of clearing his name in open session, plaintiff was merely given the right to meet secretly with three new Board members.

Finally, when the Board withdrew its termination of plaintiff's contract, it made one final, fatal thrust at him. The Board stated that "some errors of judgment were made by Mr. Elbert in the performance of his assignment as superintendent of Lanark Schools." Later in their conclusion, the Board exonerated plaintiff concerning the specific charge of misuse of public funds.

The actions of the Board during February, March, April and May of 1976 fall squarely within the parameter of precluded actions under the *Roth* decision. As this Court stated:

> "Similarly, there is no suggestion that the State, in declining to rehire the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573.

Roth defines the liberty and property rights which should be covered under 42 U.S.C. §§1983, 1985. Concerning liberty rights, this Court states:

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." (citations omitted) 408 U.S. at 572.

Petitioner was sent notice of termination and publicly accused of illegal and improper acts. He attempted to find employment elsewhere but was unemployable because of the stigma created by the false charges against him. He was refused a public hearing in order to answer the untrue charges against him. Surely he was prevented from engaging in any of the "common occupations of life" by respondents' actions: he was unable to find employment anywhere outside the school district and he had been deprived of hearing rights which he had expected and relied upon. The deprivations constitute a

loss of liberty rights and procedural due process under the Fourteenth Amendment.

As dissenting Judge Baker stressed, the lower court has confused the issue of damages and actionable cause. Renewing the terminated contract may have lessened the actual damages, but it did not allow petitioner to "regain" his lost liberty and due process rights. The deprivation of constitutionally protected rights supports recovery for damages, including punitive damages, even if compensatory damages are not present.

Directly on point is *Hostrop* v. *Board of Junior College District # 515,* 523 F.2d 569 (7th Cir. 1975), in which the Seventh Circuit found that termination of plaintiff Hostrop had been justified but he had been deprived of procedural due process. As stated by the Court:

> "The wrong done plaintiff was not the termination of his employment, for that has been determined to have been justified, *cf. Garcia* v. *Daniel,* 490 F.2d 290 (7th Cir. 1973), but the deprivation of his procedural due process right to notice and a hearing. Plaintiff is entitled to damages for that constitutional violation. Although the amount of damages for such an injury cannot be determined by reference to an objective standard, recovery of non-punitive damages for the deprivation of intangible rights for which no pecuniary loss can be shown is not without precedent. Courts have traditionally assessed such damages for tortious injury. Examples in civil rights litigation include the awarding of damages for the deprivation of voting rights, see *Nixon* v. *Herndon,* 273 U.S. 536, 47 S. Ct. 446, 71 L.Ed. 759 (1927); *Wayne* v. *Venable,* 260 F.64 (8th Cir. 1919); for the abridgment of equal opportunities to housing, see *Jeanty* v. *McKey & Poague, Inc.,* 496 F.2d 1119 (7th Cir. 1974); *Seaton* v. *Sky Realty Co., Inc.,* 491 F.2d 634

(7th Cir. 1974); for illegal arrests, see *Basista* v. *Weir,* 340 F.2d 74 (3rd Cir. 1965); *Rhoads* v. *Horvat,* 270 F.Supp. 307 (D.Col. 1967); and for violation of the right against unlawful searches and seizures, see *Sexton* v. *Gibbs,* 327 F.Supp. 134 (N.D. Tex. 1970), *aff'd,* 446 F.2d 904 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062, 92 S. Ct. 733, 30 L.Ed.2d 751 (1972); *cf. Bell* v. *Hood,* 327 U.S. 678, 684, 66 S. Ct. 773, 90 L.Ed.2d 939 (1946). See also *Smith* v. *Losee,* 485 F.2d 334, 352-353 (10th Cir. 1973) (Doyle J., dissenting). We think the case at bar presents an analogous damages problem." 523 F.2d at 579.

Petitioner was denied his procedural due process rights by the failure of defendants to grant a timely hearing before announcing termination and publishing untrue charges. The majority opinion concedes that petitioner did not receive even the "rudiments of a hearing." (Appendix A, p. 4.) No later offer of renewal of contract could restore petitioner or change the fact that he had been denied due process. The deprivation of procedural due process alone is sufficient to support a cause of action.

In the present case, petitioner did not "regain" lost rights when the notice of termination was withdrawn; the refusal to grant hearings and public dissemination of untrue charges had already been accomplished. The withdrawal of termination may be relevant to the damages suffered by petitioner, but it does not affect petitioner's right to recover for mental anguish and loss of job opportunity caused by the actions of respondents. Petitioner cannot possibly recover for the gross violations of his constitutional rights through the inadequate and highly limited remaining Count which affords, at best, only token relief.

The majority finds that the present facts "resemble the ordinarily unreviewable 'multitude of personnel decisions that are made daily by public agencies' (*Bishop* v. *Wood,* 426 U.S. 341, 349 (1976)" rather than "the serious loss of future rights or opportunities which have characterized the decisions in which a deprivation of liberty interests has been found." Petitioner respectfully disagrees with this conclusion and urges this Honorable Court to grant certiorari in order that the lower court's misapplication of the principles in *Paul* v. *Davis, supra,* be rectified.

CONCLUSION

The decision of the Court below is inconsistent with prior decisions made by this Court and is contrary to the meaning, spirit, and intent of the Civil Rights Act. This case presents constitutional questions of great impact and importance, and such questions should be decided by this Honorable Court after full briefings and argument.

For the reasons set out above, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

MEMORANDUM OPINION

No. 79-1310

DONALD G. ELBERT,

Plaintiff-Appellant,

vs.

THE BOARD OF EDUCATION OF LANARK COMMUNITY UNIT SCHOOL DISTRICT #305, CARROLL COUNTY, ILLINOIS, DENNIS STURTEVANT, VERNON VOSS, MARY HOLESINGER, and BETTYE ZIER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-1634—ABRAHAM L. MAROVITZ, *Judge.*

ARGUED MARCH 31, 1980—DECIDED SEPTEMBER 10, 1980

Before FAIRCHILD, *Chief Judge*, BAUER, *Circuit Judge*, and BAKER, *District Judge.**

FAIRCHILD, *Chief Judge.* The narrow question presented by this appeal is whether a public employee can maintain an action under 42 U.S.C. § 1983 or § 1985(3) when his termination is anounced, and presumably defamatory statements are made about him, but retractions are made and he is "rehired" before the effective date of the termination. We agree with the district court that on these facts no claim for infringement of a liberty or property interest can be made out and thus affirm the judgment appeal from.

I.

In the winter of 1976 the plaintiff, Donald Elbert, was superintendent of schools for the Lanark Community

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* The Honorable Harold A. Baker, District Judge of the Central District of Illinois, is sitting by designation.

School District. Although he was employed under a two-year contract which, on its face, would expire in June of that year, there seems to be no dispute that by force of Illinois law he was entitled to a third year as superintendent.[1] On March 8, 1976, however, the school board, by a four to three vote, decided not to renew the superintendent's contract for the 1976-77 school year. On March 9, Elbert was formally notified of that vote. The school board reaffirmed its decision at a public meeting held on

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[1] Ill. Rev. Stat. ch. 122 § 10-23.8 provides:

> To employ a superintendent under a multi-year contract. No such contract can be offered or accepted for less than or more than three years, except for a person serving as superintendent for the first time in Illinois. In such case the initial contract shall be for a two year period. Such contract may be discontinued at any time by mutual agreement of the contracting parties, or may be extended for an additional 3 years at the end of any year.
>
> The contract year is July 1 through the following June 30, unless the contract specifically provides otherwise. Notice of intent not to renew the contract must be given by the board or by the superintendent by April 1 of the year in which the contract expires, unless the contract specifically provides otherwise. Failure to do so will automatically extend the contract for 1 additional year.
>
> Notice of intent not to renew a contract when given by a board must be in writing, stating the speicfic reasons therefor. Within 10 days after receipt of such notice of intent not to renew a contract, the superintendent may request a closed session hearing on the dismissal. At the hearing the superintendent has the privilege of presenting evidence, witnesses and defenses on the grounds for dismissal.
>
> By accepting the terms of a multi-year contract, the superintendent waives all rights granted him under Section 24-11 through 24-16 of this Act for the duration of his employment as superintendent in the district.

Elbert had previously served as a superintendent in an Illinois district.

March 23, 1976, and for the first time stated reasons for the termination, which included "misuse of public funds." On April 6 several of the board members (defendants Voss, Holesinger, and Zier) met and prepared a "bill of particulars" which described in more detail the alleged misuse of public funds. The individual defendants gave this document to the local newspaper where it was printed on April 8. Although the plaintiff several times during this period requested a hearing so that he could rebut the charges against him, none was ever scheduled.

On April 10, 1976 a school board election was held at which three new board members were elected. Two of the board members who had opposed Elbert were defeated in that election. The new board met in a series of executive sessions and the plaintiff was given the opportunity to meet with the three new board members May 3, 1976. On May 10, 1976 the board voted to offer the plaintiff a contract for the upcoming school year. At the same time a public statement was issued saying that although "some errors of judgment were made by Mr. Elbert," "at no time did Mr. Elbert misuse public funds." The plaintiff, whose attempts to find employment elsewhere had been unsuccessful, signed the contract and served as superintendent of the district until his resignation in June, 1978.

As finally ruled upon by the district court, the plaintiff's complaint against the school board and four of its members contained three counts. Count I alleged that the events described above constituted a deprivation of liberty and property without due process of law, in violation of 42 U.S.C. § 1983. Count II charged the defendants with conspiracy to deprive the plaintiff of the equal protection of the laws, in violation of § 1985(3). Count III alleged that in retaliation for filing this suit the defendant board unlawfully denied Elbert a raise to which he otherwise would have been entitled. The district court judge dismissed Counts I and II, stating that since Elbert remained in the continuous employment of the board there was no loss of property rights and that

the allegation of loss of liberty rights did not meet the "stigma plus" test of our decision in *Colaizzi* v. *Walker*, 542 F.2d 969 (7th Cir. 1976) *cert. denied*, 430 U.S. 960 (1977). The defendants' request for summary judgment on Count III was denied, however, and that action remain pending in the district court. Following the procedure established by Fed.R.Civ.P. Rule 54(b), the district court judge entered judgment for the defendants on Counts I and II. This appeal followed.

II.

Had the school board not reconsidered its earlier decision to terminate the superintendent, and had he indeed left the district, we have little doubt that a claim could have been stated under § 1983. Taking the facts pleaded as true (and there does not seem to be any real dispute that the ones presented here are true), the state law setting forth the tenure of school superintendents gave Elbert a claim of entitlement to employment for the 1976-77 school year and thus a property interest in that job. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). When the board voted to deny Elbert employment for that school year without providing even the rudiments of a hearing, and had that vote not been reconsidered, the superintendent would have been deprived of a property interest without due process of law and the complaint would clearly state a § 1983 cause of action. With the addition of the charge by the board that the superintendent was being terminated for misuse of public fund (and the allegation by the plaintiff that that charge was baseless and maliciously made) a claim of a deprivation of liberty rights without due process also could have been stated. *Colaizzi* v. *Walker*, 542 F.2d 969 (7th Cir. 1976).

Similarly it appears that had the board accused Elbert of misusing public funds, but had not taken steps to terminate his employment (although such a scenario is a bit difficult to imagine), there would be no ac-

tionable claim for an unlawful deprivation of a liberty interest. Defamatory publications by a state official, however seriously they may harm someone, do not deprive that person of any liberty interests protected by the Due Process Clause. *Paul* v. *Davis*, 424 U.S. 693, 712 (1976).

Our case is neither of these. Here the school board in March took the action which it thought would effectively terminate Elbert's employment, but in May, before that termination became effective, reconsidered its decision and offered to renew the contract. Things said in connection with the March events quite possibly would have amounted to an infringement of a liberty interest without due process, but only if they were "accompanied" by a failure to rehire. *Colaizzi* v. *Walker*, 542 F.2d 969, 973 (7th Cir. 1976). The defendants insist that the actions of May are the important ones—that as long as the superintendent in fact kept his job there was no deprivation of a liberty or property interest. Elbert instead would have us focus on the events of March and early April and hold that since the board's actions were complete at that time a claim for infringement of liberty and property rights could be stated. Under that theory the events of May might serve to mitigate any damage award to which he would otherwise be entitled, but would not undo his entire cause of action.

III.

We have no difficulty in concluding that the complaint failed to state a cause of action under § 1983 for deprivation of a constitutionally protected property right. State law gave Elbert a right to be employed as superintendent of the Lanark District for the 1976-77 school year. Elbert was employed by the district for that school year. While there was a time between March and May of 1976 when the board intended not to renew the superintendent's contract, the contract was renewed and no break in employment ever occurred. Under these circumstances we cannot see how any property right was infringed.

The question of whether a liberty interest was infringed without due process is far more difficult. The test of whether a liberty interest has been infringed in an employment context has been stated as follows:

> "[S]tigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving a deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. § 1983 for deprivation of a Fourteenth Amendment liberty interest without due process. (Emphasis in the original.)

Colaizzi v. *Walker*, 542 F.2d 969, 973 (7th Cir. 1976).

The *Colaizzi* "stigma plus" test was derived directly from *Paul* v. *Davis*. Both parties rely heavily on that opinion and indeed both cite language from it which, taken literally, seems to support their claims. In *Paul* v. *Davis* the Court discussed, and seemed to reaffirm, its earlier decision in *Board of Regents* v. *Roth* which had stated that the failure to rehire a non-tenured teacher would be actionable under § 1983 if the state "in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1973). *quoted in Paul* v. *Davis*, 434 U.S. 693, 709 (1976). The Court went on to say

> "Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as

> employer might be considered responsible for a statement defaming an employee who continues to be an employee."

424 U.S. 693, 709.

The plaintiff here asserts that he was not merely defamed, but that he was defamed "in the course of" a refusal to rehire. His position is that the defamation and failure to rehire were completed acts by April 8, 1976, (the date of the newspaper article) at the latest. The subsequent decision by the board to reconsider its decision, with its accompanying public retraction of the charge that public funds had been misused, did not "undo" the infringement of his liberty interests which had already occurred any more than a retraction "undoes" a state tort claim for defamation. The defendants on the other hand (and, for that matter, the district court) rely on the language stating no hearing is required every time the State might be considered responsible for defaming an employee "who continues to be an employee." Since Superintendent Elbert's contract was renewed, and renewed before the prior one had expired, any defamation was of an employee "who continued to be an employee" and thus was not actionable under § 1983.

We tend to agree that the answer to the question presented can be found in *Paul* v. *Davis*, but we do not believe it is as obvious as either party suggests. We look instead at the policy considerations outlined in that opinion and at the application of those considerations to this case.

If *Paul* v. *Davis* can be said to have a central theme, it is a reaffirmation of the principle that § 1983 is not, and should not become, a general federal tort law. In Part I-A of the opinion the Court makes it clear that not every "legally cognizable injury which may have been inflicted by a state official acting 'under color of law' [establishes] a violation of the Fourteenth Amendment." 424 U.S. 699. In Part I-B the Court goes on to state that defamatory statements by public officials are no excep-

tion to the rule of Part A, regardless of how stigmatizing they may be. "The words 'liberty' and 'property' as used in the Fourteenth Amendment do not single out reputation as a candidate for special protection over and above other interests that may be protected by state law." 424 U.S. 701. In discussing the cases which had held that liberty interests could sometimes be implicated by state (or federal) action which stigmatized an individual, the Court was careful to note that in each case there had been an actual loss of a state-granted right (*e.g.*, the right to drink in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) or the right to attend public schools in *Goss* v. *Lopez*, 419 U.S. 565 (1975)) or an actual loss of present or future government employment (*Cafeteria Workers* v. *McElroy*, 367 U.S. 866 (1961); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

In the case before us, of course, there was no actual loss of employment. While the school board's attempt to sever its relationship with Elbert may have appeared to be technically complete at the time it sent the superintendent its "notice of intention not to renew" that action was reconsidered and reversed before it was ever expected to become effective. We think it would be an unduly technical reading of *Paul* v. *Davis* to conclude that as long as the defamation was accompanied by an official decision to terminate the plaintiff a claim for a loss of a liberty interest could be made out even though in fact no loss of employment ever occurred. When all was said and done the injury Elbert suffered was not tangibly greater than the injury he would have suffered from the defamation alone. After *Paul* v. *Davis* it is clear that redress for those injuries, if any, is to be sought under state, rather than federal, law. The events here more closely [resemble the ordinarily unreviewable "multitude of personal decisions that are made daily by public agencies" (*Bishop* v. *Wood*, 426 U.S. 341, 349 (1976)) than they resemble the serious loss of future rights or opportunities which have characterized the decisions in which a deprivation of liberty interests has

been found.] We therefore agree with the district court's decision to dismiss Count I of the plaintiff's complaint.

IV.

Count II of the complaint charged that the defendants conspired to violate the plaintiff's right to equal protection of the laws, in violation of 42 U.S.C. § 1985(3). The district court dismissed Count II on the grounds that the complaint failed to state a claim for any deprivation of any constitutionally protected right. *Lesser* v. *Braniff Airways, Inc.* 518 F.2d 538, 540, n. 2 (7th Cir. 1975). We also note that nowhere in his complaint does the plaintiff allege that the action taken against him was the result of any racial, or otherwise class-based invidiously discriminatory purpose. *Griffin* v. *Breckenridge,* 403 U.S. 88, 102 (1971). We therefore agree that Count II was also properly dismissed.

For the foregoing reasons, the judgment appealed from is AFFIRMED.

BAKER, *District Judge* (dissenting). I respectfully dissent on the ground that the plaintiff has stated a valid claim under the Fourteenth Amendment for the deprivation of a liberty interest without due process of law.

I concur that there was no deprivation of a property right because the defendants never took away the title, the compensation, or the powers of the position in which the plaintiff had the right of property. It was his liberty that was taken from him—the right to be free from stigma imposed by governmental action in the course of terminating employment.

Board of Regents v. *Roth,* 408 U.S. 564, (1972), *Paul* v. *Davis,* 424 U.S. 693 (1976), and *Colaizzi* v. *Walker,* 542 F.2d 969 (7th Cir. 1976) read together show that the harm from which constitutional protection is given is, as stated in *Paul* v. *Davis,* "governmental action defaming an individual *in the course* of declining to rehire him

. . . ." 424 U.S. at 709 (emphasis added). It is the combination of the State's actions in defaming the employee and then announcing to the world that because of his conduct the employee's services are terminated that creates the "stigma . . . that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth,* 408 U.S. at 573, *quoted in Paul* v. *Davis,* 424 U.S. at 710.

"Stigma plus" is here. When the defendants charged the plaintiff with official misconduct, they stigmatized him. When they publicly announced that his contract was terminated and thereby injured his opportunity to gain employment elsewhere, they took his liberty and they did it without due process of law. The circumstance that 48 days later a new board of education relented and reinstated him might work in mitigation of the plaintiff's damages, but it did not wash away the fact that the plaintiff had been deprived of his liberty. Acts in mitigation cannot extinguish a cause of action.

The majority reads *Davis* and *Colaizzi* as requiring actual termination of employment before a deprivation of liberty can occur. That, I submit, misconstrues the rulings in those cases and the "plus" of the test is properly equivalent to governmental action in the course of termination which forecloses the freedom to take advantage of other employment opportunities.

The majority looks to *Paul* v. *Davis* and further concludes that "the injury Elbert suffered was not tangibly greater than the injury he would have suffered from the defamation alone." But the magnitude of the injury is not the distinguishing feature of *Paul* v. *Davis.* It is whether defamation *"standing alone and apart from any other governmental action"* stated a claim for relief under 42 U.S.C. § 1983. 424 U.S. at 694 (emphasis added).

In *Paul* v. *Davis* the plaintiff was not an employee of the State. The State in *Davis,* while capable of defaming the plaintiff, could not further stigmatize him by telling the world that because of his conduct the plaintiff was

discharged from his employment. In this case, while interruption of employment never took place, the "other governmental action" was official announcement of the plaintiff's termination. The plaintiff alleges, and we must accept the allegation as true, that his employment opportunities were negatively affected and that he was unsuccessful in finding employment elsewhere after the announcement of his termination.

In *Colaizzi* v. *Walker, supra,* this Court recognized that a valid claim for deprivation of liberty may be stated in a case of State termination of employment even when the employee has no property interest in his employment. It is that same liberty interest that the plaintiff seeks to vindicate here and further to recover damages for the employment opportunities from which he was foreclosed even though he was not deprived of a property right.

I would reverse the judgment of the district court dismissing Count I and remand the case for a trial on the merits relating to deprivation of the liberty interest. In all other respects, I would affirm.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 7, 1980

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HAROLD A. BAKER, *District Judge**

DONALD G. ELBERT,

Plaintiff-Appellant,

No. 79-1310

vs.

THE BOARD OF EDUCATION OF LANARK COMMUNITY UNIT SCHOOL DISTRICT #305, CARROLL COUNTY, ILLINOIS, DENNIS STURTEVANT, VERNON VOSS, MARY HOLESINGER, and BETTYE ZIER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Easter Division.
No. 77-C-1634
ABRAMHAM L. MAROVITZ, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the plaintiff-appellant, all members of the original panel having voted to DENY a rehearing, and no judge in regular active service having requested a vote on the suggestion for rehearing *in banc*, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* District Judge Harold A. Baker of the Central District of Illinois is sitting by designation.

APPENDIX C

IN THE UNITED STATES
DISTRICT COURT
(Caption—Civil Action No. 77 C 1634)

MEMORANDUM OPINION

Motion to Dismiss

Plaintiff, Donald G. Elbert, Superintendent of Lanark Community Unit School District No. 305, Carroll County, Illinois, brings this action under 42 U.S.C. §1983 seeking damages against the Board of Education ("Board") and individual board members Dennis Sturtevant, Vernon Voss, Mary Holesinger and Bettye Zier. The jurisdiction of this Court is invoked under 28 U.S.C. §§1331 and 1343 (3). Plaintiff alleges, *inter alia,* that defendant board members conspired to and did deprive plaintiff of his rights to employment and enjoyment of a good reputation and standing in the community, under the color of state law without due process.

Specifically, plaintiff alleges that on May 29, 1974, he executed a contract to perform the duties of Superintendent of Schools for the Board. His contract for two years employment was in violation of Ill. Rev. Stat. ch. 122, §10-23.8, which purportedly requires a Superintendent's contract to be for a three year term if he or she has served as a Superintendent in Illinois in the past. On February 24, 1976, the Board, in closed session, voted not to renew plaintiff's contract. The Board again so voted in open session on March 8, 1976.

On March 16, 1976, after receiving notice of the Board's decision, plaintiff requested a hearing in a letter sent to defendant Voss. He again requested a hearing on March 24, 1976 at a regular school board meeting. At that meeting, defendant Sturtevant moved to not renew plaintiff's contract for a number of enumerated reasons, including an allegation that plaintiff had misused public funds. Defendant's motion carried, and plaintiff was so notified by March 30, 1976.

Plaintiff again requested a hearing, as well as an audit, concerning the charge of misuse of public funds. On April 1, 1976, plaintiff's attorney requested a bill of particulars concerning the charges against plaintiff. Plaintiff received the bill of particulars on April 7, 1976, signed by defendant Sturtevant. On April 8, 1976, without a formal vote or any other approval by the Board members, defendants Sturtevant, Voss, Holesinger and Zier had the bill of particulars published in the *Carroll County Review,* a local newspaper. Plaintiff alleges that defendants so acted with intent to deprive plaintiff of due process of the law.

Plaintiff was given a closed hearing before the Board on May 3, 1976. On May 10, 1076, the Board voted to rehire plaintiff for the fiscal year commencing July 1, 1976. The Board expressed that "[s]ome errors of judgment were made by Mr. Elbert in the performance of his assignment . . ." and "[t]hat at no time did Mr. Elbert misuse public funds or personally profit or benefit from any act or decision made in the performance of his assignment as superintendent." Plaintiff alleges that at no time was he afforded an opportunity to refute the charges made by the Board earlier in the year.

Plaintiff alleges further that on September 27, 1977, the Board met to consider pay increments for all certified personnel of the school district. Forty-one such persons were considered by the Board and forty persons, all those considered except plaintiff, received a raise in pay. Plaintiff alleges that "[i]t is a *de facto* rule and policy in Lanark that raises are given annually, and such policy is promulgated and fostered officially." Amended Complaint, ¶35. The only explanation plaintiff received for the denial of his pay raise was "[t]he reason is obvious." Plaintiff alleges that he was denied the raise as retaliation for his exercise of his constitutional rights in filing this action.

In Count II of his Amended Complaint, plaintiff realleges the portions of Count I which dealt with his dis-

missal and subsequent rehiring. Plaintiff alleges that defendants conspired to deny him due process of the law.

Pending before the Court is defendants' motion to dismiss for want of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Rules 12 (b) (1) and (6), F.R.Civ.P. For the reasons set forth below, defendants' motion is granted in part and denied in part.

I.

A.

Plaintiff first contends that he was denied a property interest in his employment without due process of the law by the actions of the Board during the months of February to May, 1976. In the landmark decision of *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) the Supreme Court held that the Constitution does not require a hearing before the nonrenewal of a nontenured teacher's contract unless the teacher can show that the decision somehow deprived him or her of a "liberty" interest or a "property" interest in continued employment.

Even by the broadest exercise of judicial imagination, it is difficult to grasp what "property" interest plaintiff lost once he was rehired by the Board in May, 1976. Plaintiff argues in brief that, under the circumstances, his dismissal would have precluded him from seeking employment elsewhere. He does not allege in his complaint, however, that he had sought other employment. Nor does he allege that any third party had refused to hire him.

Simply stated, whatever property interest plaintiff held in his job was returned to him by the school board prior to the termination of his then pending contract. Therefore, plaintiff suffered no grievous loss of a property interest.

B.

Plaintiff also alleges the loss of a "liberty" interest by the Board's actions, particularly the publication of the

bill of particulars which listed a number of charges which cast doubt on his integrity and competence.

In *Board of Regents* v. *Roth, supra* at 572-73, the Court held that a liberty interest might be sufficient to give rise to a federal claim under the Fourteenth Amendment where a state refused to reemploy a person under such circumstances that might damage his standing and associations in the community, or where the reasons for refusal to reemploy the person might impose a stigma or other disability that foreclosed that person's right to take economic advantage of other employment opportunities. Defendants urge that plaintiff's Amended Complaint "seeks nothing more than to assert under the label of constitutional deprivation a state defamation claim." We agree.

Unlike Roth, the plaintiff here did not lose his job. The fact situation in this case is more similar to that in *Paul* v. *Davis,* 424 U.S. 693 (1976), *reh. denied* 96 S. Ct. 2194. In that case, the question before the Court was whether a charge that a state officer defamed a person, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under the Fourteenth Amendment and 42 U.S.C. §1983. The Court held that it did not.

> "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's actions. Rather his interest in his reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of these interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." 424 U.S. at 711-712.

In his dissent in *Paul* v. *Davis, supra,* Mr. Justice Brennan expressed concern with the majority's failure to analyze Kentucky law to determine whether plaintiff's rights were adequately protected by state law. In Illinois, it is clear that plaintiff does have an adequate remedy under a common law tort theory against state officials. See Ill. Rev. Stat. 1973. ch. 37, §439.8(d).

Plaintiff attempts to distinguish *Paul* v. *Davis, supra,* on the grounds that the decision did not involve a state employer-employee relationship, notice of termination of employment, a series of statements, meetings, charges, and efforts to unlawfully terminate employment, reliance on an illegal contractual provision, nor effective loss of job possibility elsewhere. We have already noted that plaintiff failed to allege facts which indicate any loss of future employment possibilities, and in fact never had lost his present job. Nevertheless, the deprivations of liberty alleged by the plaintiff in *Paul* are as great, if not greater, than those liberty interests plaintiff alleges he lost here.

In the words of Mr. Justice Brennan:

> "The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society." 424 U.S. at 714.

Plaintiff also argues that he was stigmatized by the publication of the bill of particulars, and hence, under *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), was deprived of his interest in his good name, reputation and standing in his community. In *Constantineau,* the Supreme Court struck down a Wisconsin law which required the "posting" of a notice in retail liquor outlets that certain named individuals were not to be sold liquor because of their "excessive drinking" would, *inter alia,* have them become "dangerous to the peace" of the community. The

notices were to be posted without any provision for hearing or notice to the individuals so listed. The controlling factor in *Constantineau,* however, was not that the notices stigmatized individuals, but rather that the notices infringed on their right to purchase liquor, a right they previously held under state law. See *Paul* v. *Davis, supra,* at 708-709.

In determining whether plaintiff lost any "liberty" interest by the actions of the Board, the Court again finds significant the fact that plaintiff does not specifically allege any loss of employment opportunities. In addition, the most serious of the charges against plaintiff were retracted by the Board. While retraction may not be a defense in a common law defamation action, given the most recent Supreme Court pronouncement on this issue in *Paul* v. *Davis, supra,* it would seem to further take defendants' actions outside the realm of unconstitutional deprivation.

In *Board of Regents* v. *Roth, supra,* the Court stated:

> "Not every remark which may arguably affect one's reputation violates due process if made by the government official without a hearing, for the Fourteenth Amendment protects only against charges that might seriously damage (one's) standing and associations in the community." 408 U.S. at 573.

We therefore hold that plaintiff did not suffer a sufficiently grievous loss of a property or liberty interest to state a claim under the Fourteenth Amendment. In light of this conclusion, the Court need not address the question of what process was due plaintiff prior to the actions taken by the Board. It should be noted, however, that plaintiff was afforded a hearing, at which he was represented by counsel, in the manner which he had requested. See Plaintiff's Exhibit B. The fact that the hearing was not held at the time plaintiff had requested it to be held, could not be seen to amount to a denial of due process.

II.

In the latter part of Count I of plaintiff's Amended Complaint he alleges that the Board has a *de facto* policy of granting pay increments to certified personnel and that he was singled out as the sole person not to receive a pay increment. Amended Complaint, ¶¶30-38. He further alleges that the Board stated "[t]he reason is obvious" why he did not receive a pay raise. Plaintiff alleges that he was denied a pay increase as retaliation for his exercise of his constitutional rights in bringing this action.

In *Board of Regents* v. *Roth, supra,* the Court stated:

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

In *Perry* v. *Sindermann,* 408 U.S. 593 (1972) the Supreme Court held that an allegation that a college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled plaintiff to an opportunity of proving the legitimacy of his claim to job tenure.

Defendants broadly assert that "[t]here is no state law, board policy or general understanding that secures an expectation of a salary increment."

On a motion to dismiss, plaintiff's averments must be treated as admitted. *Gardner* v. *Toilet Goods Association,* 387 U.S. 167 (1957). We therefore hold that plaintiff's allegations that he was denied a pay increase in retaliation for the exercise of his right to petition the government for redress and his right to access to the courts states a claim upon which relief can be granted. Accordingly, ¶10-38 of the Amended Complaint must stand.

III.

Count II of plaintiff's Amended Complaint realleges ¶¶2-29 of Count I, those paragraphs alleging the events around the decision to not renew his contract and the subsequent decision to renew his contract. See Part I, *supra.* In addition, Count II alleges that defendants Sturtevant, Voss, Holesinger and Zier conspired to deprive plaintiff of his constitutional rights.

In this Circuit it is well settled that to entitle a plaintiff to relief on a theory that defendants conspired to deprive him of his constitutional rights, plaintiff must allege both that defendants so conspired *and,* in fact, his rights were violated. See *Lesser* v. *Braniff Airways, Inc.,* 518 F.2d 538, 540 n.2 (7th Cir. 1975) and cases cited therein. In Part I of this Memorandum Opinion we held that plaintiff failed to state a claim upon which relief can be granted with his allegations of the events which transpired during February to May, 1976. *A priori,* Count II of plaintiff's Amended Complaint, alleging that defendants conspired to deny him due process, cannot state a claim upon which relief can be granted. Accordingly, Count II of the Amended Complaint is stricken.

For the reasons set forth above, defendants' motion to dismiss is granted in part and denied in part.

ENTER:

/s/ Abraham L. Marovitz
JUDGE

DATED: January 9, 1978

APPENDIX D

IN THE UNITED STATES
DISTRICT COURT

(Caption—Civil Action No. 77 C 1634)

MEMORANDUM OPINION

Motion to Dismiss or for Summary Judgment

Plaintiff Donald G. Elbert, Superintendent of Lanark Community Unit School District No. 305, Carroll County, Illinois, brings this action under 42 U.S.C. §1983, seeking damages against the Board of Education ("Board") and individual board members Dennis Sturtevant, Vernon Voss, Mary Holesinger and Bettye Zier. The jurisdiction of this Court is invoked under 28 U.S.C. §§1331 and 1343(3). Plaintiff alleges, *inter alia,* that defendant board members conspired to and did deprive plaintiff of his rights to employment and enjoyment of a good reputation and standing in the community, under the color of state law, without due process.

Specifically, plaintiff alleges that on May 29, 1974, he executed a contract to perform the duties of Superintendent of Schools for the Board. His contract for two years employment was in violation of Ill. Rev. Stat. ch. 122, §10-23.8, which purportedly requires a Superintendent's contract to be for a three year term if he or she has previously served as a Superintendent in Illinois. On February 24, 1976, the Board, in closed session, voted not to renew plaintiff's contract. The Board again so voted in open session on March 8, 1976.

On March 16, 1976, after receiving notice of the Board's decision, plaintiff requested a hearing in a letter sent to defendant Voss. He again requested a hearing on March 24, 1976 at a regular school board meeting. At that meeting, defendant Sturtevant moved to not renew plaintiff's contract for a number of enumerated reasons, including an allegation that plaintiff had misused public funds. Defendant's motion carried, and plaintiff was so notified by March 30, 1976.

Plaintiff again requested a hearing, as well as an audit, concerning the charge of misuse of public funds. On April 1, 1976, plaintiff's attorney requested a bill of particulars concerning the charges against plaintiff. Plaintiff received the bill of particulars, which was signed by defendant Sturtevant on April 7, 1976. On April 8, 1976, without a formal vote or any other approval by the Board members, defendants Sturtevant, Voss, Holesinger and Zier had the bill of particulars published in the *Carroll County Review,* a local newspaper. Plaintiff alleges that defendants so acted with intent to deprive plaintiff of due process of the law.

Plaintiff was given a closed hearing before the Board on May 3, 1976. On May 10, 1976, the Board voted to rehire plaintiff for the fiscal year commencing July 1, 1976. The Board expressed that "[s]ome errors of judgment were made by Mr. Elbert in the performance of his assignment . . ." and "[t]hat at no time did Mr. Elbert misuse public funds or personally profit or benefit from any act or decision made in the performance of his assignment as superintendent." Plaintiff alleges that at no time was he afforded an opportunity to refute the charges made by the Board earlier in the year.

Plaintiff alleges further that on September 27, 1977, the Board met to consider pay increments for all certified personnel of the school district. Forty-one such persons were considered by the Board and forty persons, all those considered except plaintiff, received a raise in pay. Plaintiff alleges that "[i]t is a *de facto* rule and policy in Lanark that raises are given annually, and such policy is promulgated and fostered officially." Second Amended Complaint, Count III, ¶8. The only explanation plaintiff received for the denial of his pay raise was "[t]he reason is obvious." Plaintiff alleges that he was denied the raise as retaliation for his exercise of his constitutional rights in filing this action.

In Count II of his Second Amended Complaint, plaintiff realleges the portions of Count I which dealt with

his dismissal and subsequent rehiring. Plaintiff alleges that defendants conspired to deny him due process of the law.

On January 9, 1978, this Court issue a Memorandum Opinion on defendants' motion to dismiss the Amended Complaint. We dismissed Count I of the Amended Complaint, finding that *Paul* v. *Davis,* 424 U.S. 693 (1976) *reh. denied* 96 S. Ct. 2194 controlled the facts as alleged. We found the fact that plaintiff did not lose his job and had not alleged any loss of future employment possibilities reduced his claim simply to one of defamation, not actionable under 42 U.S.C. §1983.

Correspondingly, we also dismissed Count II of plaintiff's Amended Complaint, which realleged the facts of Count I and alleged that defendants Sturtevant, Voss, Holesinger and Zier conspired to deprive plaintiff of his constitutional rights. We let stand, however, the section of plaintiff's Amended Complaint which alleged that the Board has a *de facto* policy of granting yearly pay increments and had denied plaintiff a pay increment in retaliation for his lawsuit against the Board.

In light of our decision of January 9, 1978, plaintiff has submitted a Second Amended Complaint which, in substance, differs very little from his Amended Complaint. As to Count I, however, plaintiff now alleges that by defendants' actions he "has been and will be deprived of an opportunity to seek employment elsewhere than Lanark, Carroll County, Illinois." Second Amended Complaint, Count 1 ¶37.

Pending before the Court is defendants' motion to dismiss for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment. Rules 12(b)(6) and 56, F.R.Civ.P. Defendants have submitted seven affidavits and a number of exhibits and plaintiff has filed four depositions, all of which the Court has thoroughly considered. For the reasons set forth below, defendants' motion to dismiss Counts I and II is

granted and defendants' alternative motion for summary judgment is granted as to Count III.

In the Memorandum Opinion of January 9, 1978, this Court addressed the question of whether plaintiff's claim regarding the Board's actions between February 24 and May 3, 1976 fell within the purview of *Board of Regents* v. *Roth,* 408 U.S. 564 (1972). We found that plaintiff failed to allege that the Board's action deprived him of any "liberty" or "property" interest, stating:

> "Unlike Roth, the plaintiff here did not lose his job. The fact situation in this case is more similar to that in *Paul* v. *Davis,* 424 U.S. 693 (1976) *reh. denied,* 96 S. Ct. 2194. In that case, the question before the Court was whether a charge that a state officer defamed a person, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under the Fourteenth Amendment and 42 U.S.C. §1983. The Court held that it did not." Mem. Op. at 6-7.

As plaintiff points out, this Court noted in its opinion that plaintiff had not alleged that he had sought or had been denied employment on account of defendants' action. Plaintiff now alleges that he "attempted to obtain employment in other school districts. Although application was made for employment elsewhere, plaintiff was refused a position in other school districts." Second Amended Complaint, Count I, ¶33. What plaintiff fails to note, however, is that in the Memorandum Opinion the Court also found that plaintiff alleged that he was rehired by the Board prior to the expiration of his contract. In short, plaintiff had never been terminated.

In *Paul* v. *Davis, supra,* the Supreme Court stated:

> "Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who *continues to be an employee.*" 424 U.S. at 710 (Emphasis added).

Since the decision in *Paul* v. *Davis, supra,* a number of lower courts, including the Seventh Circuit Court of Appeals, have interpreted the language quoted above to formulate a "stigma plus" test. *Danno* v. *Peterson,* 421 F. Supp. 950, 954 (N.D. ILL. 1976). In *Colaizzi* v. *Walker,* 542 2d 969 (7th Cir. 1976) *cert. denied,* 430 U.S. 960 (1977), for example, the Court recognized that "the combination of stigma plus failure to rehire or affirmatively to discharge states a claim even if the failure to rehire or discharging of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment ." *Austin* v. *Board of Education,* 562 F. 2d 446, 450 (7th Cir. 1977). In *Colaizzi, supra,* the Court explained:

> "[S]tigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found in *conjunction* state a claim under 42 U.S.C. §1983 for deprivation of a Fourteenth Amendment liberty interest without due process." 542 F. 2d at 973 (Emphasis in original).

See also, *Dennis* v. *S & S Consolidated Rural H.S. District,* 577 F. 2d 338 (5th Cir. 1978).

Thus, while plaintiff's allegation that he had sought and been denied employment because of defendants' actions may have relevance to any damages that he seeks had he stated a claim under *Roth,* the moment the Board offered to renew his contract, whatever liberty or property interest he deemed lost had been regained. The fact that plaintiff is unable to obtain employment outside of defendants' school district may also have bearing on a common law defamation action in state court, but it does not buttress a claim under 42 U.S.C. §1983. See, *e.g., Paul* v. *Davis, supra,* 424 U.S. at 711-712. In summary, plaintiff's allegation that his contract was renewed on May 10, 1976, before his prior contract expired causes his

claim to fall short of the "stigma plus" analysis suggested in *Colaizzi, supra.* Second Amended Complaint, Count I ¶28. We therefore strike Count I of plaintiff's Second Amended Complaint.

For the reasons stated in the Memorandum Opinion of January 9, 1978, pp, 12-13, we also strike Count II of the Second Amended Complaint. In that count, plaintiff realleges Count I and alleges that defendants Sturtevant, Voss, Holesinger and Zier conspired to deprive plaintiff of his constitutional rights. It is well settled that to entitle a plaintiff to relief on a theory that defendants conspired to deprive him of his constitutional rights, plaintiff must allege both that defendants so conspired and, in fact his rights were violated. *Lesser* v. *Braniff Airways, Inc.,* 518 F.2d 538, 540 n.2 (7th Cir. 1975) and cases cited therein. Because we have held that defendants did not deprive plaintiff of his rights as alleged in Count I, Count II fails to state a claim upon which relief can be granted.

Defendants seek summary judgment on Count III of the Second Amended Complaint. In the Memorandum Opinion of January 8, 1978, this Court had already held that the allegations contained therein (Amended Complaint, Count I, ¶¶30-38), stated a claim upon which relief could be granted. In substance, the Court held that where the Board has a *de facto* policy in granting yearly pay increments to certified personnel, plaintiff's allegations that he was denied a pay increase in retaliation for his right to petition the government for redress and his right of access to the courts is cognizable under *Perry* v. *Sindermann,* 408 U.S. 593 (1972).

Defendants argue that there is no board policy, faculty handbook nor any other indicia of a *de facto* policy that certified personnel are to receive yearly pay increments. In support of their position, defendants submit the minutes of Board meetings held in 1964, 1965, 1966 and 1972, at which the Board denied increments for the superintendent and other personnel. See, Def. Ex., #8. These show,

defendants urge, that plaintiff's expectation of a raise was merely unilateral and cannot give rise to a protected interest. *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

In *Bishop* v. *Wood,* 426 U.S. 341, 344 (1976), the Supreme Court stated:

> "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." (Footnotes omitted).

At this juncture, of course, the Court can look beyond the face of the Second Amended Complaint to the rather comprehensive set of exhibits, offered by both parties, now on file. Rule 56(b), F.R.Civ.P. Defendants' Exhibit 11 is a copy of an Employment Agreement between plaintiff and defendants, executed on August 2, 1976. The Employment Agreement was effective from July 1, 1976 to June 30, 1977, and provided plaintiff with $23,400 in compensation. Defendants' Exhibit 9 is a copy of the most recent pertinent Employment Agreement between plaintiff and defendants. This agreement was effective from July 1, 1977 to June 30, 1978. It also provided plaintiff with $23,400 in compensation. Plaintiff alleges that the Board denied him his pay increment on September 27, 1977. The alleged denial took place not three months after plaintiff signed a contract with defendants agreeing to $23,400 compensation.

This Court finds that plaintiff's claim of a *de facto* entitlement to a pay increment is baseless in light of a freely executed contract which provided plaintiff with a set compensation for a set term. There is no clause in the Employment Agreement which even implies that plaintiff may have been entitled to a pay increment in his contract.

The fact that all certified employees of the school district except plaintiff were granted pay increments does

not support his position. Of the school district's forty-one certified employees, only plaintiff was a superintendent. Illinois law explicitly treats the employment of school teachers and school superintendents differently. *Compare,* Ill. Rev. Stat. (1961), ch. 122, §10-21.1 with Ill. Rev. Stat. (1975), ch. 122, §10-21.4 Therefore, plaintiff can point to no contract, ordinance or State law which would indicate that he had a right to a pay increment.

As defendants argue, looking to the record in this case, the Supreme Court's decision in *Perry* v. *Sindermann, supra,* is readily distinguishable. In Perry, a ten-year employee was discharged for exercising his First Amendment rights. The college where he taught had no formal tenure policy *per se,* but did have an explicit policy of retaining faculty members as long as their teaching services were satisfactory. 408 U.S. at 600. The Court found that the employee could have relied upon this *de facto* policy as if it were a grant of tenure.

Here, however, there was nothing upon which plaintiff could rely as an automatic policy of pay increments. While pay increments were frequently granted to certified personnel, defendants' exhibits show that there are a number of instances when they were not. While plaintiff was the only certified employee to have been denied a pay raise on September 27, 1977, he was also the only certified employee who was a superintendent. In short, plaintiff's claim of a right to a pay increment is nothing more than a unilateral expectation. In light of the employment contract that plaintiff executed a few months before he expected a pay raise, his expectation was not particularly sound.

Accordingly, defendants' motion to dismiss Counts I and II of the Second Amended Complaint is granted and defendants' motion for summary judgment on Count III is also granted.

ENTER:

/s/ Abraham L. Marovitz

JUDGE

DATED: November 21, 1978

APPENDIX E

IN THE UNITED STATES
DISTRICT COURT

(Caption—Civil Action No. 77 C 1634)

MEMORANDUM OPINION

Motion for an Amendment to and Relief from Memorandum Opinion of November 21, 1978

Plaintiff Donald G. Elbert, Superintendent of Lanark Community Unit School District No. 305, Carroll County, Illinois, brings this action under 42 U.S.C. §1983, seeking damages against the Board of Education ("Board") and individual board members Dennis Sturtevant, Vernon Voss, Mary Holesinger and Bettye Zier. The jurisdiction of this Court is invoked under 28 U.S.C. §§1331 and 1343(3).

On November 21, 1978, this Court entered a Memorandum Opinion granting defendants' motion to dismiss Counts I and II of the Second Amended Complaint and granting defendants' motion for summary judgment on Count III of the Second Amended Complaint. Pending before the Court is plaintiff's motion to reconsider, styled as a motion for an amendment to and relief from, the Memorandum Opinion of November 21, 1978. For the reasons set forth below, we modify that section of the Memorandum Opinion concerning Count III of plaintiff's Second Amended Complaint, reverse the order granting defendants' motion for summary judgment on Count III and reinstate this action as to Count III. We let stand, however, the order dismissing Counts I and II of the Second Amended Complaint.

In Count III, plaintiff alleges that on September 27, 1977, the Board met to consider pay increments for all certified personnel of the school district. Forty-one such persons were considered by the Board and forty persons, all those considered except plaintiff, received a raise in pay. Plaintiff alleges that "[i]t is a *de facto* rule and

policy in Lanark that raises are given annually, and such policy is promulgated and fostered officially." Second Amended Complaint, Count III, ¶8. The only explanation plaintiff received for the denial of his pay raise was "[t]he reason is obvious." Plaintiff alleges that he was denied the raise as retaliation for his exercise of his constitutional rights in filing the original Complaint in this action, which made the allegations substantively raised in Counts I and II of the Second Amended Complaint.

On January 9, 1978, this Court issued a Memorandum Opinion on defendants' motion to dismiss the First Amended Complaint. We let stand the section of that Complaint which alleged that the Board has a *de facto* policy of granting yearly pay increments and had denied plaintiff in retaliation for his lawsuit against the Board. On November 21, 1978, we issued a second Memorandum Opinion, granting defendants summary judgment on the same issue. We found, *inter alia,* that plaintiff's claim of a *de facto* entitlement to a pay increment is baseless in light of a contract, which he had executed, providing plaintiff a set compensation for a set term.

Plaintiff now asserts, albeit without any affidavit or other documentation, that he executed his employment contract *after* his pay increment had been denied. In the Memorandum Opinion, this Court assumed that the contract was executed on the date it was to become effective, July 1, 1977. We therefore held that, under the terms of the contract, plaintiff had nothing but a unilateral expectation that he was entitled to a raise in pay when the Board voted on the issue on September 27, 1977. Because it is now apparent that this Court was incorrect in its assumption of the date the employment contract was executed, we must address the parties' contentions presented by defendants' motion for summary judgment to determine whether there remain any genuine issues of material fact pertinent to Count III of the Second Amended Complaint.

Defendants argue first that there is no Board policy, faculty handbook nor any other indicia of a *de facto* policy that certified personnel are to receive yearly pay

increments. In support of their position, defendants submit the minutes of Board meetings held in 1964, 1965, 1966 and 1972, at which the Board denied increments for the superintendent and other personnel. See Def. Ex. #8. These show, defendants urge, that plaintiff's expectation of a raise was merely unilateral and cannot give rise to a protected interest. *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

Plaintiff, however, argues that minutes which show that three persons were not given raises over a period of ten year prior to 1977 are insufficient to rebut his allegation that a *de facto* raise policy does exist. We agree with plaintiff that the evidence is insufficient to warrant summary judgment. Defendants have submitted no evidence on the circumstances of the prior denials of pay increments. On a motion for summary judgment, the Court cannot assume that the examples cited by defendants are not factually distinguishable from plaintiff's claim. There is no evidence, for example, that the prior denials were not voluntary acts of employees or were the result of causes not applicable to plaintiff.

The argument for which defendants offer the most support is that plaintiff's raise was denied not in retaliation for plaintiff's legal action, but as a result of the Board's dissatisfaction with his performance as superintendent. Defendants submit the affidavits of Bettye L. Zier; Joe Rath; O. Clark Miller; Dennis A. Sturtevant; Doris J. Kruse; Keith L. Kniss and Eugene R. Barklow, Board members. Def. Exs. ##1-7. Each affiant avers that he or she denied plaintiff a salary increment for a number of reasons, most of which concern plaintiff's relationship between the parents, community and school employees of his district or his failure to promptly execute Board directives.

Plaintiff, on the other hand, has submitted depositions of Dennis Sturtevant, O. Clark Miller, Keith Kniss and Eugene Barklow.

In the course of the depositions, counsel for plaintiff sought to elucidate the reasons behind the affiants' aver-

ments. The depositions tend to show that the individual Board members did consider plaintiff's lawsuit when his raise was denied. In short, the depositions submitted by plaintiff are sufficient to raise an issue of fact as to the credibility of the affidavits upon which defendants rely.

We agree with defendants that if *any* permissible reason exists for the denial of plaintiff's pay increment, then the fact that the Board considered protected conduct in denying him a raise is not sufficient to entitle plaintiff to relief. *Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). Nevertheless, "[c]ases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the issues turn on the credibility of the affiants." *Conrad* v. *Delta Air Lines, Inc.,* 494 F.2d 914, 918 (7th Cir. 1974). In the case at bar, the question of the Board's motivation in denying plaintiff a pay increment cannot be resolved by affidavit.

It is clear that this Court cannot enter summary judgment where there is a factual dispute, even though plaintiff's evidence on file is not compelling. *Hughes* v. *American Jawa, Ltd.,* 529 F.2d 21, 25 (8th Cir. 1976). We have found that there is a genuine issue of material fact as to whether there existed a *de facto* policy of annual pay increments for certified personnel at Lanark and whether plaintiff was denied such an increment for constitutionally permissible reasons.

Accordingly, plaintiff's motion for an amendment to and relief from the Memorandum Opinion of November 21, 1978 is granted as to Count III of the Second Amended Complaint. We let stand the order granting defendants' motion to dismiss Counts I and II of the Second Amended Complaint, and reinstate the cause as to Count III.

ENTER:

/s/ Abraham L. Marovitz

JUDGE

DATED: February 13, 1979

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

(Caption—Civil Action No. 77 C 1634)

FINAL ORDER

The Memorandum Opinions of November 21, 1978, and February 13, 1979, dismissing Counts I and II of the Second Amended Complaint are hereby amended to add the following statement:

Judgment is hereby entered for the dismissal of Counts I and II of the Second Amended Complaint, and there is no just reason for delay in enforcement or appeal of the dismissal of Counts I and II. This is a final judgment as to Counts I and II under Rule 54(b) of the Federal Rules of Civil Procedure.

ENTER:
/s/ Abraham L. Marovitz
JUDGE

DATED: April 20, 1979